IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPLICATION NO. 603 OF 2005
IN
COMPANY PETITION NO.352 OF 1996

Rakesh K. Gosher. ..Petitioner.

Vs.

M/s. Woodlands Garden Cafe and ors.
..Respondents.

Mr.Chandu Mehta i/by Dhru Liladhar & Co. for the Petitioner.

Mr. Rajiv Narula with Mr. Khaire for the Respondents.

CORAM : A.M. KHANWILKAR, J.
DATED : 30/6/2005

P.C.:

1. Heard counsel for the parties. Perused the pleadings and documents on record.

2. By this application, the applicant prays that the order dated 3.2.2005 passed by this court in Company Petition No.352 of 1996 be recalled. This prayer is founded on pleadings in Para 15 of the affidavit in support of the application. The averments in Paragraph 15 of the affidavit, in my opinion, would require examination on merits, which is impermissible, having regard to the limited scope

of the present application in the context of order dated 3.2.2005, which was consent order obtained by the parties on merits. In that sense, it is not open for this court to recall the order dated 3.2.2005 on the averments made in Paras 15 of the affidavit.

3. The counsel for the applicant would then contend that the court may at least consider the relief in terms of prayer clause (b), that the Official Liquidator, High Court even though would proceed to take possession of the property should not disturb the physical possession of the applicant and allow the applicant to carry on business in the name and style Woodlands Garden Cafe as his agent till the highest bid is accepted and consequential steps taken in terms of direction contained in Paragraph 7 of the order dated 3.2.2005. This prayer is however, strenuously opposed by the petitioner on the argument that if such relief was to be granted, that would result in modifying the terms of the order dated 3.2.2005, which is a consent order, which will be impermissible.

4. There is no doubt that the order dated 3.2.2005 is a consent order. Clause 5 of the consent terms

agreed between the parties provide that if the applicant failed to pay the monthly share or profit as per clause 3 of the consent terms on its due date or amount payable by the applicant to the petitioner as provided in clause 2(a) of the consent terms, there will be an order in terms of prayer clause (c) of the application. Prayer Clause (c) of the petition reads thus:

> "that pending the hearing and final disposal of this petition, the Official Liquidator, High Court be appointed as the Provisional Liquidator of Respondent No.1 viz. Woodlands Garden Cafe together with all its assets, properties including those properties more particularly described in Exhibits "F" as also its business and affairs and books of accounts papers documents, vouchers and files belonging to respondent no.1 with all powers under the provisions of the Companies Act, 1956".

This relief, in my opinion, does not provide for taking over physical possession of the properties as such. So understood, if the alternative relief claimed by the applicant in the present application was to be granted that would not result in modifying the consent terms as is rightly contended on behalf of the applicant. In my opinion, it is in the interest of parties to continue the business in the present form till bid is conducted in terms of Paragraph 7 of the order dated 3.2.2004 and the

highest bidder is allowed to take over the running business. If it is a running business, obviously the offer would be higher in relative terms.

5. Accordingly, I am inclined to allow this application in terms of prayer clause (b). In other words, Official Liquidator even if takes over the possession of the assets and properties as specified in the prayer clause (c) of the petition, will allow the applicant to continue to conduct the business in the premises in the name and style Woodlands Garden Cafe till the highest bidder is allowed to take over running business in terms of direction contained in Paragraph 7 of the order dated 3.2.2005. In the mean time, Official Liquidator shall require the applicant to give undertaking to pay the royalty as may be determined for conducting the business in the disputed premises, till such time the Official Liquidator holds the public auction. The advertisement for conducting public auction be issued within 10 days from today and the public auction be conducted on the specified date not exceeding four weeks and forth with appoint the highest bidder as his agent on usual terms and conditions. The applicant shall file undertaking stating that he will abide by the directions of the

Official Liquidator determining the royalty in respect of the disputed premises for running business therein which will be due and payable from 1.7.2005.

6. The applicant is willing to pay sum of Rs.50,000/-. The counsel for the petitioner has accepted the cheque made over to him by the counsel for the applicant on clear understanding that the payment is in relation to the obligation under the consent terms between the parties and without prejudice to his rights and contentions.

7. The Official Liquidator to conclude the public auction within four weeks from the date of advertisement. The applicant shall deposit sum of Rs.75,000/- with the Official Liquidator within one week from today failing which the Official Liquidator shall proceed to take physical possession of the premises by taking police assistance if required on the 8th day from today. In addition, the applicant shall further deposit sum of Rs.25,000/- on account towards the fees of the valuer who would conduct the inventory and valuation of the movable and immovables lying in the premises.

Even this amount will have to be deposited within one week from today. Application is accordingly, disposed of.

(A.M. KHANWILKAR,J.)